Consensus Without Court

Encouraging mediation in non-family civil disputes in Scotland
About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of Scottish consumers, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interest we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors’ clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sector. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

• carrying out research into consumer issues and concerns;
• informing key policy and decision-makers about consumer concerns and issues;
• influencing key policy and decision-making processes;
• informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC’s Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister. Martyn Evans, the SCC’s Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS
Can consumers actually get the goods or services they need or want?

CHOICE
Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION
Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS
If something goes wrong, can it be put right?

SAFETY
Are standards as high as they can reasonably be?

FAIRNESS
Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION
If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?
Chairman’s preface

We are all likely to become involved in a civil dispute of some kind during our lifetime. We might have a problem with faulty goods, with a landlord or neighbour, or suffer damage to our property. When this happens, we want to resolve the problem as quickly and painlessly as possible. Consumer disputes can often be sorted out quickly and informally without the need for any formal means of dispute resolution.

In an ideal world, this would always be the case. However, we do not live in an ideal world. Where a dispute cannot be resolved informally, the parties involved may have no alternative but to turn to the civil justice system. Traditionally, this has meant taking the matter to court.

In recent years it has been increasingly acknowledged throughout the world that an adversarial approach may not always be the best way to resolve a dispute. The court system highlights the conflict between the parties, it is slow and it is expensive. The level of legal fees and court expenses, together with the limited availability of legal aid and the intimidating nature of court proceedings conspire to deter ordinary people from taking their disputes to court.

A growing awareness of the disadvantages of the court system has led to increased interest in alternative dispute resolution, or ADR. The most commonly used form of ADR is mediation, where a neutral third party helps the parties in dispute to reach an agreement which is acceptable to both sides.

While mediation has flourished in other parts of the world, it has been slow to develop in Scotland outwith the family and community fields. By drawing on existing research and recent developments both in Scotland and England, together with experience elsewhere, this paper attempts to offer some insight into how the development of mediation in civil and consumer disputes might be encouraged in Scotland.

We believe that mediation can offer consumers an accessible, affordable means of resolving their disputes in appropriate cases, within the context of an integrated Scottish network of community legal services. The increased availability of mediation as an option for resolving disputes would be an important step towards achieving better access to justice for consumers in Scotland.

Graeme Millar  August 2001
Chairman
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Summary

Resolving disputes by ADR
Consumers who become involved in disputes need to have access to an appropriate, affordable, means of resolving them.

The court system has a number of disadvantages. It is costly and slow, while those who decide to take a case to court by themselves often find it an intimidating and stressful experience. These considerations, together with the limited availability of legal aid, have resulted in a situation where many ordinary people cannot afford to take their disputes to court.

A growing awareness of the disadvantages of the court system has led in recent years to increased interest throughout the world in the development of alternative means of resolving disputes. These methods of dispute resolution are referred to as alternative (or appropriate) dispute resolution, or ADR.

Mediation

The most commonly used form of ADR is mediation. While mediation has flourished in countries such as the USA and Australia, and is beginning to develop in England and Wales, it has not yet taken hold to any great extent in Scotland. While there has been some success in family and community mediation, it has been slow to develop in other sectors, such as commercial and consumer disputes.

The role of mediation
Mediation can offer a number of advantages over the court process, in appropriate cases:-

• It offers flexibility, and focuses on what the parties want to achieve
• It offers parties informality and privacy
• It can be quicker and cheaper than court

Mediation will not be the best option for resolving every dispute. Whether it is the most appropriate solution will depend on the circumstances of each particular case.

Mediation can be useful when the parties are in dispute over something other than, or in addition to, money. In such cases, the flexibility of mediation gives it the potential to ensure that both parties achieve the settlement they want. Mediation can also be particularly useful where there is a continuing relationship between the parties.

There is no particular type of dispute which is more suited to mediation than any other. Although there are some types of case which may never be suitable for mediation, it is capable of success across a wide range of civil cases.

If mediation is to work, it must be approached on a voluntary basis. Consumers must be free to choose the form of dispute resolution they wish to pursue.
Mediation in context
The legal system should encourage the early resolution of disputes, to try to ensure that people go to court only as a last resort. Consumers must have access to sufficient advice and information to allow them to make informed choices about how they resolve their disputes.

While the majority of mediation schemes currently deal only with cases which have been lodged in court, there is scope for using mediation to resolve disputes before they reach that stage.

The present situation
In England and Wales, the use of mediation has increased in recent years as a result of the civil justice reforms. However, mediation in civil disputes has been slower to develop in Scotland.

While there are a considerable number of trained mediators in Scotland, there is little demand for their services in commercial and consumer disputes.

The only significant mediation initiative in Scotland in the field of consumer disputes is the mediation project at Edinburgh sheriff court.

There is a need to ensure that those providing mediation services are competent, have undergone appropriate training, and maintain their skills by means of continuing professional development. However, there is little regulation of mediators in Scotland at present. There is presently no universally accepted set of quality standards for mediation, while the extent of the training provided by the various training organisations varies.

What are the barriers to the development of mediation in Scotland?
The principal barriers to the development of mediation are cultural. There is a general lack of awareness of and/or support for mediation among members of the public, the legal profession, other advisers and the judiciary. Scotland has not had the benefit of a civil justice review like that in England and Wales, while proposals for community legal services in Scotland are still at the development stage. While civil justice reforms have begun to break down the cultural barriers in England and Wales, these barriers remain in Scotland.

How can the use of mediation be encouraged in Scotland?
• There is a need for a full-scale review of the entire Scottish civil justice system. This review must recognise the potential value of mechanisms for resolving disputes outwith the traditional adversarial court system, including mediation.

• Mediation schemes must form an important part of any integrated network of community legal services. If efficient and effective community legal services are to become a reality, there is a need for central government support for mediation services as part of its overall civil justice policy.
• Mediation must be promoted in the context of a general culture of resolving disputes at the earliest possible opportunity. Consumers, businesses and public bodies alike, as well as their representatives, must be encouraged to see the benefits of settling their case before they get to the stage of using any formal process, whether this be court or an ADR process.

• Cultural barriers to mediation must be overcome. The key to changing attitudes lies in raising awareness about mediation among members of the public, the legal profession, lay advisers and the judiciary.

• There is a need for a large-scale publicity campaign in Scotland on the benefits of mediation.

• The Law Society of Scotland must take steps to promote the benefits of mediation to solicitors. It must encourage its members not only to consider becoming mediators themselves, but also to act as representatives in mediation.

• There is a need for increased consideration of mediation in the university law curriculum, to ensure that future solicitors are aware of mediation and its benefits before entering the profession.

• There is a need to raise awareness of mediation among lay advisers and staff in the civil courts.

• Sheriffs and judges must be made more aware of the benefits of mediation, and provided with suitable training. The courts should encourage the use of mediation as an alternative to a full court hearing in appropriate cases.

• If the use of mediation is to be promoted in civil and consumer disputes, mediation services must be supported by public funding. Such services will improve access to justice, while saving money currently channelled into court-based dispute resolution.

• How mediation schemes would be administered and run will require consideration. A useful starting point might be to examine how existing schemes elsewhere operate. Initially, pilot projects could be set up in different geographical areas, based on a variety of models, before rolling out the more successful models throughout Scotland.

• There is a need for further in-court advice projects, which can identify and refer appropriate cases to mediation either before a court action is raised or before a full court hearing.

• If the availability and use of mediation are to increase, it will be necessary to address the difficult question of regulation and quality control of those providing mediation services. Membership of any regulatory body for those practising as mediators should include a majority of consumer interests.
1 Background

1.1 Resolving disputes

Everyone is likely to become involved in some kind of dispute at some time in his or her life. Scottish Consumer Council research carried out in 1997 suggested that one in five of the Scottish population had a serious dispute about a matter concerning the civil law during the previous three years.¹

Such disputes can arise where, for example, an individual buys faulty goods, or has a problem with a landlord or a neighbour. The law provides a wide range of rights to protect people in such situations. However, these rights are meaningless unless those who become involved in disputes have access to an appropriate, affordable, means of resolving them.

In an ideal world, most disputes would be resolved quickly and informally without the need for recourse to any formal means of dispute resolution. As it is, many disputes are presently dealt with in an informal manner. Many traders have customer care policies designed to resolve matters at an early stage. Some retailers have, for example, introduced comprehensive refund and exchange policies for their customers. Good businesses often subscribe to an effective trade code of practice, whereby disputes can be resolved by informal negotiation, conciliation and complaints procedures.

A consumer involved in a civil dispute will not always be the party taking action, however. They may instead find themselves in a position where action is being taken against them. They may, for example, be pursued by a trader for an unpaid bill, or by another individual claiming compensation for damage to his or her car after an accident.

Whether pursuing or defending a dispute, it is in the interests of both the consumer and the other party involved to resolve matters as quickly and informally as possible. Unfortunately, however, while such speedy and informal means of resolving disputes should be encouraged, disputes cannot always be settled in this manner.

In such cases, the consumer may have to turn to the civil justice system in order to resolve the dispute. Traditionally, this has meant taking the dispute to court. This involves a legal contest between the two parties, where a final decision is imposed by the presiding judge or sheriff. One party to the dispute will ‘win’, while the other will ‘lose’.

It is increasingly acknowledged throughout the world that such an adversarial approach may not always be the best way to resolve every dispute. There are many reasons why this may be true. First and foremost, adversarial dispute resolution, by its very nature, serves to highlight the conflict between the parties involved. This can be particularly problematic where there is an ongoing relationship between the parties.

¹ Civil Disputes in Scotland: A report of consumers’ experiences; Scottish Consumer Council, 1997
Taking a dispute to court can also be very costly. Legal fees are expensive, while court expenses tend to be awarded against the loser, acting as a strong disincentive to court action. The court system can also be very slow, and parties may have to wait for months, even years, before their case is finally decided. These considerations, together with the limited availability of legal aid, have resulted in a situation where many ordinary people simply cannot afford to take their disputes to court.

Moreover, those who decide to take a case to court by themselves, usually under the small claims procedure, often find this to be an intimidating and stressful experience. Research has shown that the procedure is not operating as informally as was originally intended, placing party litigants at a disadvantage against those who are legally represented.²

1.2 Alternative/appropriate dispute resolution

A growing awareness of the disadvantages of the court system has led in recent years to increased interest in the development of alternative means of resolving disputes. Today, our civil justice system also encompasses a number of less formal dispute resolution mechanisms, such as social security and employment tribunals. There are also a number of ombudsman schemes dealing with disputes in particular sectors, such as insurance and financial services. Other forms of dispute resolution include arbitration, conciliation and mediation.

These informal methods of dispute resolution are collectively referred to as alternative dispute resolution, or ADR. Alternative dispute resolution mechanisms have a number of advantages over the traditional court process. They can result in earlier settlement, either before litigation begins or during the court process, thus saving time and money for both parties, as well as the courts.

The informal and flexible nature of ADR also means that the outcome of the dispute is likely to be more satisfactory for both parties. The parties have the opportunity to be more directly involved in the process than in court, giving them greater control over the outcome.

ADR has been very successful in some sectors. Perhaps the best known example is ACAS (Advisory, Conciliation and Arbitration Service), which has been conciliating employment disputes for twenty-five years. The various ombudsman schemes in a number of different sectors have also been generally well used by consumers.

In recent years, there has been an increasing trend towards defining ADR as ‘appropriate’, rather than ‘alternative’ dispute resolution. Non court-based means of resolving disputes are accordingly viewed in terms of whether they are the most appropriate method of resolution for a particular dispute.

ADR originated in the United States, as a reaction to an overburdened legal system, characterised by disproportionate delays and costs. In the 1970s, Harvard law professor Frank Sander developed a model for the ‘multi-door courthouse’. His concept was of a civil justice system based around dispute resolution centres, where litigants would be directed to the process most appropriate for their case.

This vision has now become a reality in some US courts. ADR has flourished in the USA over the past twenty years, and the idea has taken hold in many other countries throughout the world, notably Australia and Canada.

The use of ADR is also increasing in the European context, particularly in relation to cross-border disputes. A recent European Union Council resolution proposed the establishment of a European extra-judicial network based around national ‘clearing houses’ to help consumers use out of court dispute resolution schemes in other member states, when they become involved in disputes with traders in those countries.³

ADR has, however, been slow to develop within the UK. Over the past few years, there has been some movement towards the greater use of ADR in England and Wales. Recent changes have stemmed largely from Lord Woolf ’s review of the civil justice system. The 1999 consumer white paper issued by the UK government,⁴ which envisaged ADR as a means of resolving consumer disputes, was followed by a discussion paper on ADR in England and Wales.⁵

The Scottish civil justice system, however, has not had the benefit of a civil justice review. It must be acknowledged that there has been some recent recognition of the potential benefits of ADR in Scotland in other fields. For example, recent proposals for a Scottish Information Commissioner envisage that she or he will have power to resolve disputes by ADR,⁶ while it has also been suggested that a Scottish Human Rights Commission should have similar powers.⁷ However, in civil justice terms, Scotland remains some way behind England and Wales in ADR development.

### 1.3. Mediation and consumer disputes

The most commonly used form of ADR is mediation. Mediation is a process whereby a neutral third party attempts to help the parties in dispute come to an agreement which is acceptable to both sides. This report is concerned with the development of mediation, and how it might benefit consumers with civil disputes.

There has to date been some success in the use of mediation in Scotland, notably in family disputes, and to a lesser extent community mediation, which deals largely with neighbour disputes. However, mediation has been slow to develop in other sectors, such as commercial and consumer disputes.

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3. Council resolution of 25 May 2000 on a community-wide network of national bodies for the extra-judicial settlement of consumer disputes. This network will be known as the EEJ-NET
4. Modern Markets: Confident Consumers; Department of Trade and Industry, July 1999
5. Alternative Dispute Resolution— a Discussion Paper; Lord Chancellor’s Department, 1999
6. Freedom of Information: Consultation on Draft Legislation; Scottish Executive, March 2001
The benefits of mediation are slowly being recognised by many in Scotland. In 1998, the Scottish Office asked for views on whether legal aid funds should be made available for mediation in non-family civil disputes, as part of a consultation on community legal services in Scotland.8

More recently, announcing the establishment of a working group on community legal services, the Justice Minister said:

"Individuals need to have access to effective forms of dispute resolution. Funding by the state should be provided where it was reasonable to do so in order to provide access. The forms of civil dispute resolution should be effective in their working, proportionate to the issues involved and fair in their effects. We should also encourage ways of diverting dispute resolution away from the courts to mediation and conciliation services wherever this is appropriate."9

This paper looks at the benefits of mediation in resolving civil and consumer disputes, and considers how it might fit into the existing civil justice system. It reflects on developments in mediation elsewhere, including recent initiatives in England and Wales, and considers why mediation is not widely used in Scotland at present.

The aim of this paper, which draws on the existing research, together with recent developments both in Scotland and England, and the exploration of experience elsewhere, is to offer some insight into how the development of mediation in non-family civil disputes might be encouraged in Scotland.

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8. Access to Justice: Beyond the Year 2000; Scottish Office Home Department, 1998
9. From a speech given by Jim Wallace, Deputy First Minister and Minister for Justice, to the Scottish Legal Aid Board’s 50th anniversary conference on 10 October 2000.
2 The role of mediation

2.1 What are the benefits of mediation?

Mediation can offer a number of advantages over the court process, in appropriate cases. As one expert has put it:-

“Mediation can add value to the normal claims settlement process in civil disputes. It offers a cathartic pseudo ‘day in court’ to parties; it gets cards on the table and all the parties around the table; and, with the help of a skilled mediator, it introduces some authoritative objectivity into the assessment of the strengths and weaknesses of the parties’ claims.”

*Mediation is flexible, and focuses on what the parties want to achieve*

The mediator concentrates on the parties’ interests, rather than their strict legal rights. The mediation process can introduce non-legal solutions to meet the needs and interests of the parties. Mediation is therefore capable of achieving a ‘win/win’ result, with both parties achieving the outcome they want, rather then the ‘win/lose’ result imposed by a court decision.

The powers of the courts are very limited and inflexible, being largely geared towards awarding financial compensation. A court cannot, for example, order one party to apologise to the other. However, an apology could be agreed through mediation. The payment of money is not always the primary remedy sought by those involved in disputes, as demonstrated by Scottish Consumer Council research.

When asked what they wanted to get out of the dispute, half of the respondents said they were seeking financial compensation or a refund. However, more than half also said they wanted to prevent it happening to someone else in the future. Moreover, 43% said they wanted an apology, while 41% said they wanted an explanation.

Research has shown that settlement figures agreed through mediation tend to be lower than the sum a court might have been expected to award. However, this does not necessarily mean that the party agreeing to a settlement is unhappy with the outcome. They may be happy to agree to a lower sum for a number of reasons. They may, for example, simply wish to reach a quicker resolution and/or avoid going to court. It may also be that the settlement incorporates something else in addition to money, such as an apology, or an undertaking to do something.

*Mediation offers parties informality and privacy*

Mediation gives the parties a chance to be heard, and to put forward their case, in a less formal, more private, environment than a court. Given that both parties have indicated willingness to try to resolve the dispute, there is likely to be more trust between them than there would be in a court. This should in turn make it easier for the parties to communicate with each other.

10. The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor’s Department Research Series No 5/98; Professor Hazel Genn, 1998 at pviii
12. Note: some respondents gave more than one answer
13. The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor’s Department Research Series No 5/98; Professor Hazel Genn, 1998
Mediation can be quicker and cheaper than court

Mediation is likely to lead to faster settlement of a dispute than going to court. Recent research on a London court-annexed pilot mediation scheme found that mediated settlements occurred several months earlier than non-mediated cases. Most parties whose case settled at mediation believed the mediation had saved time.\(^{14}\)

The available research is, however, inconclusive as to whether mediation costs less than going to court. While some research suggests that mediation can be cheaper than legal remedies,\(^{15}\) other studies indicate that this may not always be the case.\(^{16}\)

2.2 When does mediation work best?

It is important to recognise that mediation will not be the best option for resolving every dispute. Whether it is the most appropriate solution will depend on the circumstances of each particular case.

Mediation can be useful when the parties are in dispute over something other than, or in addition to, money. One or both parties will often be seeking something that a court cannot grant, such as an apology. In such cases, the flexibility of mediation gives it the potential to ensure that both parties achieve the settlement they want.

Mediation can be particularly useful where there is a continuing relationship between the parties. This might be the case in a dispute between two businesses, a landlord and tenant, or an employer and employee. A settlement reached through mediation, which has been agreed by both parties, is more likely to preserve that relationship than a court judgement in favour of one party.

Research on family mediation has shown that the effects of mediation can extend beyond simply resolving the specific issues in dispute. The research suggests that one of the main objectives of family mediation is the improvement of communication between the parties, facilitating their continuing relationship as parents.\(^{17}\) It is therefore possible that mediation in other types of case could lead to a similar outcome.

2.3 What kinds of dispute are suitable for mediation?

There is no particular type of dispute which is more suited to mediation than any other. To date, mediation has been prevalent in the family and commercial spheres in countries such as the USA and Australia. However, recent research suggests that, where the parties have volunteered to accept mediation, it is capable of success across a wide range of civil cases.\(^{18}\)

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14. See note 13
15. See eg Resolving Neighbour Disputes through Mediation in Scotland; Jim Dignan and Angela Sorsbury; Scottish Office Central Research Unit, 1999
16. See note 13
17. The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999
18. See note 13
This conclusion is borne out by the experience of the mediation project at Edinburgh sheriff court, which has dealt with a wide range of low-value civil disputes, including landlord-tenant and consumer disputes.

There are, however, some types of case which may by their very nature never be suitable for mediation. These are likely to be cases involving:

- A severe imbalance of power between the parties. This is discussed further at 2.4 below.
- A need for an objective assessment of complex factual evidence (in some personal injury claims, for example).

### 2.4 Power imbalances

Recent research suggests that mediation can magnify any imbalance of power between the parties. Such an imbalance might exist where an unrepresented consumer is involved in a dispute against a legally represented company or a local authority. Examples might include housing dampness claims or eviction cases.

It must be acknowledged, however, that were such a dispute to go to court, and in the absence of legal aid, the imbalance between the parties would still exist. Unrepresented party litigants face legally represented parties every day in Scotland's civil courts. In an adversarial system, the unrepresented litigant is clearly disadvantaged.

A good mediator should be aware of any such power imbalance, and take steps to minimise this imbalance so far as possible. Existing codes of practice for mediators recognise this problem, and seek to ensure that mediators do their best to address this.

Any power imbalance will also be addressed to some extent by the provision of good quality advice and information for consumers on their legal position.

### 2.5 The need for a voluntary approach

If mediation is to work, it must be approached on a voluntary basis. Consumers must be free to choose the form of dispute resolution they wish to pursue. They must not be forced into mediation, simply because they cannot afford any other option.

The available research suggests that if mediation is to be successful, both parties must be willing to try it, while genuinely wishing to reach a settlement.

In his review of the civil courts in England and Wales, Lord Woolf stopped short of recommending compulsory mediation, on the grounds that it was wrong in principle to deny citizens their entitlement to seek a remedy from the civil courts.

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19. See Paragraph 4.3 for details
20. See note 13
21. See for example, Section 6 Civil/Commercial Mediation Code of Practice, Law Society of England and Wales, April 1999; Mediation UK Practice Standards for Mediators, 1998
22. See Paragraph 3.2
Research on ADR in Scotland has shown that a substantial majority of those involved in ADR support a voluntary approach to mediation.\textsuperscript{23} In any case, compulsory mediation may be in breach of human rights legislation.

The referral of small claims to compulsory arbitration (another form of ADR) in England and Wales has been held to be in breach of the right to a fair hearing under human rights law.\textsuperscript{24} Although arbitration differs from mediation in that the impartial third party issues a binding decision to resolve the dispute, it might be assumed that similar reasoning would apply to compulsory mediation.

\textsuperscript{23} Alternative Dispute Resolution in Scotland; Richard Mays and Bryan Clark, Scottish Office Central Research Unit, 1996

\textsuperscript{24} Scarth v The United Kingdom (application no. 33745/96) judgement of the European Human Rights Commission dated 22/7/99. The Commission ruled that there had been a breach of Article 6 of the European Convention on Human Rights, which is now enshrined in UK law by the Human Rights Act 1998.
3 Mediation in context

3.1 Mediation and community legal services

To date, public funding for legal services has been concentrated in traditional areas of law (such as divorce, residence of/contact with children, and personal injuries) dealt with by solicitors in private practice, and geared towards the adversarial court system. Current discussions on community legal services in Scotland envisage moving away from this approach, towards using public money to fund legal services in more effective ways.

Such reform should increase access to justice for those who do not currently receive legal help with their disputes. A comprehensive integrated network of community legal services would ensure that people are directed towards the most appropriate means of resolving their dispute. Mediation services should form a vital part of the community legal services network.

One possible way forward would be to follow the American ‘multi-door’ approach towards dispute resolution. In Cambridge, Massachusetts, for example, cases arriving at the multi-door courthouse are ‘screened’ on intake, and directed to the most appropriate type of dispute resolution option available, including mediation, arbitration and a trial in court.25

The ‘multi-door’ concept is a flexible one, which could be employed to produce a variety of models. For example, the first port of call need not necessarily be a court building, while the ADR schemes to which cases are referred need not be attached to a court, but might be elsewhere in the community. It is essential that any ‘multi-door’ scheme takes a ‘joined-up’ approach, ensuring that there are strong links and efficient and effective referral systems between the various agencies providing legal services in any community.

3.2 Resolving disputes at an early stage

It is important that people are encouraged to resolve their disputes as early and as informally as possible. At present, the vast majority of court cases are resolved before they reach a full court hearing. The legal system should therefore encourage the early resolution of disputes, to try to ensure that people go to court only as a last resort.

It is essential that consumers have access to sufficient advice and information from the outset to allow them to make informed choices about how they resolve their disputes.

Consumers must be able to access the advice and help necessary to enable them to determine, understand and articulate their legal position. The level of advice and help required will depend on the individual concerned. Some consumers may simply require a minimal amount of information and/or advice, and will be able to pursue the matter themselves, while others will need more comprehensive advice and assistance.

25. See Multi Option Justice at the Middlesex Multi-Door Courthouse; Barbara Epstein Stedman, in Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s, published by Legal Action Group, 1996
Having ascertained his or her legal position, the consumer must then be made fully aware of the various dispute resolution options available. This should involve looking firstly at informal options, such as complaints procedures, or trade codes of practice. If these are unsuccessful, the consumer should be advised as to the availability and nature of more formal mechanisms, including mediation as well as court action.

Once that consumer has made a decision based on the advice and information given, s/he should be referred towards the most appropriate local agency for resolution of his or her dispute.

While early settlement of disputes is desirable, it is inevitable that some cases will still end up in court. At present, the majority of mediation schemes throughout the world apply only to cases which have been lodged in court, and many are in fact court-annexed. However, there is considerable scope for using mediation to resolve disputes before they reach the court stage.

This is demonstrated by the experience of the Edinburgh mediation project, where almost half (41%) of referrals to mediation during the year to March 2000 were made prior to an action being raised. One-quarter of all mediation hearings, together with half of those cases resolved by the mediation co-ordinator, resulted from referrals made before the case reached court.

### 3.3 Mediation and the courts

Where a case does reach the court stage, the court itself has an important role in promoting the use of mediation. What should the nature of this role be, however? Should it be left to individual sheriffs and judges to use their discretion, or should they be required by court rules to refer cases to mediation?

In the United States, there is a clear emphasis on active ‘case management’ by the courts. Federal legislation has since 1990 required all federal district courts to introduce cost and delay reduction plans, encouraging the use of ADR. Since 1998, all district courts have been obliged to require litigants in civil cases to consider ADR. Each court has a responsibility to provide all litigants with access to at least one ADR process.

However, there has been some concern that many state courts are now going even further by introducing compulsory referrals to mediation or arbitration. In Canada, too, a mandatory mediation programme for civil disputes was established in Ontario in 1999.

In his review of the civil justice system in England and Wales, Lord Woolf emphasised the importance of the judiciary’s role in promoting ADR. The resulting court rules are very much based on the American concept of case management.

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26. See Paragraph 4.3 for further details
28. Civil Justice Reform Act 1990
Under the new rules, the court has a duty to manage cases actively, which includes encouraging the parties to use alternative dispute resolution where appropriate. Litigants are asked at the start of proceedings whether they wish a one-month stay to attempt to settle the case by mediation. If both parties consent, the court can order a stay. However, the court has power to order a stay of its own initiative, if it considers this appropriate.

Thus, the rules do not make mediation compulsory. However, they do allow the courts to apply pressure on parties and their lawyers to consider mediation seriously. If the stay does not lead to settlement, the court can ask the parties questions about mediation. Such questions might include whether they agreed to try mediation, and if they did not, why not. The courts will also be able to use costs as a sanction. The court has discretion as to the costs awarded, and in doing so must have regard to the conduct of parties, including the manner in which the party has pursued or defended the case.

There is no explicit duty on the courts in Scotland to manage cases in this way. However, there are a number of court rules which require sheriffs to play a role in seeking to resolve disputes at an early stage. Under ordinary cause procedure, the sheriff is required to ‘secure the expeditious progress’ of a case at the options hearing stage.\(^{31}\) New rules for commercial cases in some sheriff courts go even further in requiring the sheriff to seek to secure the ‘expeditious resolution’ of a dispute.\(^{32}\)

There is also a Scottish precedent for discretionary referral to mediation. In family actions involving parental responsibilities or rights, sheriffs have since 1990 had discretion to refer a family dispute to mediation at any stage where this seems appropriate.\(^{33}\)

Research on the operation of this rule found a real diversity of approach among sheriffs. Some never referred parties to mediation, while others did so only where this was specifically requested by the parties’ solicitors. Some sheriffs, however, referred all or most disputed cases almost as a matter of course. This variation in practice seemed to depend on the sheriff’s views on the role of the courts in family cases, and on the value of mediation.\(^{34}\)

While family mediation does have unique characteristics, it might be assumed that sheriffs would react in a similarly diverse fashion in relation to other types of mediation. It is therefore essential that sheriffs are given appropriate training in mediation processes, whether a voluntary or a rule-based approach is followed.\(^{35}\)

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31. Ordinary Cause Rule 9.12(1). Note: Rule 33.22A also contains an analogous provision for family cases, in relation to child welfare hearings.
32. Ordinary Cause Rule 40.12(1), incorporated by Act of Sederunt (Ordinary Cause Rules) Amendment (No.3) (Commercial Actions) 2000, with effect from 31 March 2001. Note: similar rules apply to commercial actions in the Court of Session
33. Ordinary Cause Rule 33.22
34. The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999 at Section 3
35. See paragraph 6.9 for further discussion on judicial training and court rules relating to mediation
4 The present situation

4.1 Context
While there have been significant developments elsewhere, most notably in the USA, Canada and Australia, mediation has been slower to develop within the UK. The evidence suggests this is largely due to a lack of experience and knowledge of 1/ how mediation works, and 2/ how disputes suitable for mediation might be identified. Although mediation has grown in popularity in recent years, it is still a relatively new concept within our civil justice system.

4.2 England and Wales
In recent years, the UK government has shown an increased interest in exploring alternative ways of resolving disputes in England and Wales, as part of its drive to modernise the civil justice system.

Lord Woolf considered ADR at some length in his civil justice review, and his Access to Justice report helped to open up the debate on ADR in England and Wales. His recommendations resulted in new court rules introduced in April 1999. These rules impose a duty on the court to manage cases actively, which includes encouraging the parties to use alternative dispute resolution where appropriate.

Early indications suggest that most lawyers believe the new rules have had a positive impact on the early settlement of cases, reducing the volume of litigation. The Centre for Dispute Resolution (CEDR), the leading mediation provider in the UK, reported a 50% increase in mediations over the first year of operation of the rules.

The increased interest in mediation has also led to the establishment of civil mediation schemes. In 1996, a pilot mediation scheme was established in the Central London county court. The scheme deals with non-family civil disputes with a value of over £3000. Despite a disappointing take-up rate, the vast majority of litigants and solicitors who participated in the scheme over the first two years commented positively on their experience.

An ADR scheme, primarily offering mediation, has also been set up in the Court of Appeal. This scheme deals with all cases other than family and immigration matters and judicial review. More recently, another court-annexed pilot scheme offering mediation in civil and commercial disputes at all levels was launched at Leeds Combined Court Centre in July 2000.

In late 1999, a consultation paper was issued on how alternative dispute resolution in England and Wales might be further promoted and developed. The community legal service in England and Wales, which provides public funding to assist people with legal problems, including various forms of dispute resolution, was launched in April 2000.

36. Civil Procedure Rules 1998. These are discussed in more detail at paragraph 3.3
37. The CEDR Civil Justice Audit, CEDR, April 2000
39. The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor’s Department Research Series No 5/98; Professor Hazel Genn, 1998
40. Alternative Dispute Resolution- a Discussion Paper; Lord Chancellor’s Department, 1999
4.3 Scotland

Unfortunately, mediation in civil disputes has been slower to develop in Scotland. Mediation has become well established in the field of family law, while the use of community mediation, which deals mainly with neighbour disputes, is also increasing in Scotland.

Research in 1999 found that there were three community mediation schemes in operation in Scotland. The most prominent of these is Edinburgh Community Mediation Project, which was established in 1995 and is managed by SACRO (Safer Communities and Reducing Offending). Two Scottish councils were also running in-house community mediation services, while a number of other councils were planning similar services.41

However, in other types of civil case, progress has been slow. In 1996, research on ADR provision in Scotland concluded:-

‘the concept of ADR has not been uniformly embraced within the various areas of civil dispute’.42

The research found that, although there were a reasonable number of trained mediators in Scotland, many had not yet undertaken any mediations. Moreover, those who had done so had dealt with very few cases. The situation appears to have changed little in the intervening years. While there are a considerable number of trained mediators in Scotland, there remains little demand for their services in commercial and consumer disputes.

The Association of Mediators has around one hundred members in Scotland, all of whom are trained and accredited mediators. The majority of its members are, however, presently inactive due to lack of demand for their services. An organisation offering mediations in commercial cases, Core Mediation Limited, has also been recently established by a group of experienced CEDR-accredited lawyer mediators.

The Law Society of Scotland currently has around 65 solicitor-mediators accredited under its ACCORD scheme. However, the Society advises that due to a lack of demand, there have been very few ACCORD referrals in the last few years. The mediation service set up by the Faculty of Advocates in 1994 also seems to have been little used, although no statistical data on the number of mediations is available.

The only significant mediation initiative in Scotland in the field of consumer disputes has been running in Edinburgh since 1995. The project, established by Edinburgh Central Citizens’ Advice Bureau, provides the services of a number of mediators free of charge. The mediators are all trained and accredited by either CEDR or the Law Society of Scotland. The project initially suffered from a low take-up rate, with only twenty three mediations during its first three years.

41. Resolving Neighbour Disputes through Mediation in Scotland; Jim Dignan and Angela Sorsbury; Scottish Office Central Research Unit, 1999

42. Alternative Dispute Resolution in Scotland; Richard Mays and Bryan Clark, Scottish Office Central Research Unit, 1996
However, the number of referrals increased dramatically in the third year of the project. This was due to close links with the pilot in-court advice project in Edinburgh sheriff court, which is jointly managed by the Scottish Consumer Council and Citizens’ Advice Scotland. The project provides advice to consumers involved in small claims, summary cause, housing and Debtors (Scotland) Act cases. When the in-court adviser began to refer those involved in suitable cases to the mediation project, it became apparent that, when faced with appearing in court, people became more receptive to alternative means of resolving their dispute.43

Since 1998, the mediation project has continued as part of the in-court advice project. In 1999-2000, there were sixteen mediations, of which fourteen were successful. During the same period, a further twenty-three disputes were resolved by the mediation co-ordinator, while eleven were settled by the parties themselves, without the need for a mediation hearing.44

4.4 Quality standards and regulation of mediators
There is little regulation of mediators in Scotland at present. The only means of regulation are 1/ the control of mediation organisations themselves,45 2/ market forces, and 3/ those who fund mediation schemes, and have power to withdraw that funding. This means that as things stand, anyone can establish a mediation service, regardless of their competence, the extent of their training or their experience.

The need for quality is important in relation to all dispute resolution services, including mediation. Those who use such services are entitled to expect that the people providing those services are competent, have adequate training and expertise, and that the services will be of a good standard. The issue of quality standards is central to the current debate on community legal services.

Some organisations, such as the Association of Mediators,46 the Law Society of England and Wales,47 and Mediation UK,48 have published quality standards and/or codes of practice for their own mediators, while CAMPAG has produced common standards for mediators operating in different fields of mediation.49

At present, however, there is no universally accepted set of quality standards for mediation. In England and Wales, all agencies which are part of the community legal service are awarded a quality mark. The quality mark is based on a set of common standards which aim to ensure that people know where to go for advice and what to expect. The Legal Services Commission is currently working on the production of a quality mark specifically tailored to mediation services.

45. For example, accreditation by CEDR and/or the Law Society of Scotland
46. Code of Practice; the Association of Mediators
47. Civil/Commercial Mediation Code of Practice; Law Society of England and Wales, April 1999
48. Practice Standards for Mediators; Mediation UK, 1998
The recently established Joint UK Mediation Forum, bringing together the key UK mediation training and provider organisations, has also been considering the production of a set of common standards which would apply throughout the UK.

To date, the lack of demand for mediation services has meant that regulation and quality control of mediators has not been a priority in Scotland. However, if the use of mediation is to be encouraged, and if those using mediation services are to have confidence in them, the need for regulation and quality control will require to be addressed.

4.5 Mediation training

There are currently no uniform UK standards in relation to training for mediators. While many mediators are qualified lawyers, others come from a variety of backgrounds. The foremost training organisation is CEDR, which accredits those who successfully complete its training. CEDR does not have a separate base in Scotland. The ADR Group, which trains only lawyer mediators, is also based in England.

CAMPAG has, however, developed a standard UK mediation qualification for mediators in various fields. This S/NVQ has been developed by CAMPAG, the lead body, and has involved experienced mediators. It has been accredited by the Scottish Qualifications Authority and its counterpart in England and Wales, the Qualifications Curriculum Authority.

Until recently, the only Scottish-based training organisation was the Mediation Bureau, set up by a former sheriff, Marcus Stone. This organisation provides mediation training for solicitors, business people and other professionals, in the fields of community and commercial mediation.

Core Mediation Limited, another newly established Scottish mediation organisation run by lawyers who are accredited CEDR mediators, has also recently begun to offer training in mediation.

There is some diversity in the extent of the training provided by the various training organisations, and in the provision of ongoing training and continuing professional development.

As some have recognised, it is inevitable that the content and approach of training will vary from one type of mediation to another. For example, the best approach in carrying out a family mediation is very different to the best way to tackle a commercial mediation. However, there is a need to ensure that all of those providing mediation services are competent, have undergone appropriate training, and maintain their skills by means of continuing professional development.

50. See note 49
51. See eg Alternative Dispute Resolution in Scotland; Richard Mays and Bryan Clark, Scottish Office Central Research Unit, 1996
5 What are the barriers to the development of mediation in Scotland?

5.1 Background
The available research strongly suggests that some of the principal barriers to the development of mediation throughout the UK are cultural. There is a general lack of awareness of and/or support for mediation among members of the public, the legal profession, and the judiciary.

Yet the ADR movement is gathering speed in England and Wales, while Scotland is lagging behind. Why is this the case? The answer may lie in the way in which mediation is viewed in the context of their respective civil justice systems.

Scotland has not had the benefit of a civil justice review like that in England and Wales, which put mediation firmly at the heart of the civil justice system. That review led to court rules which encourage the use of mediation, and to a community legal service, which has been in operation since April 2000. Meanwhile, proposals for community legal services in Scotland are still at the development stage.

One important consequence of the reforms in England and Wales has been their effect on awareness of mediation, and how it is viewed by those involved in the civil justice system. Thus, the civil justice reforms have begun to break down the cultural barriers in England and Wales.

In Scotland, however, these barriers remain. In 1996, Scottish Office research concluded that:

‘The message from legal practitioners, mediators and ADR organisations is that the Scottish public and the professions are substantially unaware of ADR and its benefits.’

Five years later, in the absence of any major civil justice reforms, the evidence suggests that this situation has changed little.

5.2 Public awareness
There is some evidence that members of the Scottish public are not generally aware that mediation exists as an alternative to going to court. Research on the Edinburgh project found that all but one of the parties evaluated had never heard of mediation prior to approaching a citizens’ advice bureau, solicitor or the in-court adviser. Even in the more established field of family mediation, the parties involved generally have relatively little awareness of the process.

If, however, those with disputes were aware of the availability and benefits of mediation, it is likely that some would opt for this method of dispute resolution. Scottish Consumer Council research suggests that if those with disputes knew about mediation, many would prefer this to going to court.

52. Alternative Dispute Resolution in Scotland; Richard Mays and Bryan Clark, Scottish Office Central Research Unit, 1996
54. The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999
Over half of those with a dispute said they would have preferred their case to be settled by mediation, including a third who had already gone to a court or tribunal. Even among those who won their case, almost three in ten would have preferred an alternative way of resolving the dispute.55 These views are borne out by the experience of those who have actually been through the mediation process. Those who did take their dispute to the Edinburgh mediation project found it to be a positive experience which they would be prepared to try again, even though they had not necessarily achieved a successful outcome.

Parties reported finding the process easy to follow, relaxed and easy to understand. It was also seen as cheap, and less time-consuming than court.56 The vast majority of litigants who participated in the London scheme in its first two years also commented positively on their experience.57

The present lack of public awareness about mediation in Scotland is a major stumbling block in its development. If people were aware of its existence as an option, the evidence suggests that many would choose it as a means of resolving their disputes.

Those involved in disputes must be in a position to make an informed choice about the available means of resolving them. Solicitors and other advisers have a central role to play in informing people about the available methods of resolving their disputes, as discussed at 5.3 and 5.4 below.

Public demand could also be further stimulated by the provision of readily available and accessible information about mediation. If consumers knew of the existence of non court-based methods of dispute resolution, and the potential benefits, they would be more likely to ask their solicitor or adviser for information about these.

5.3 The legal profession

The legal profession has an important role in helping people to decide how to resolve their disputes. Solicitors, whether in private practice, law centres or other agencies, will form an important part of any network of community legal services. However, the evidence indicates that solicitors generally have little knowledge or experience of mediation.58 It is therefore unlikely that these solicitors are advising their clients of the availability of mediation as a means of resolving their disputes.

Some solicitors are undoubtedly in favour of mediation, particularly those who have trained as mediators. However, there is some evidence that solicitors generally lack enthusiasm about mediation. For example, the research on the London county court pilot scheme59 found that joint demand for mediation was lowest when both parties were legally represented.

57. The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor’s Department Research Series No 5/98; Professor Hazel Genn, 1998
58. See for example The Central London County Court Pilot Mediation Scheme Evaluation Report; Lord Chancellor’s Department Research Series No 5/98; Professor Hazel Genn, 1998; The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999
59. See note 57
It is likely that this lack of enthusiasm is due in part to a lack of knowledge and experience of mediation techniques. Research suggests that, even where solicitors have some limited knowledge of mediation, their clients enter the process with relatively little idea of what is involved. One consequence of this lack of understanding can be low expectations of the mediation process among the parties involved.\(^{60}\)

It is also possible that some solicitors are concerned that they will appear weak by agreeing to participate in a mediation process at odds with the adversarial system in which they have been trained.

It may also be that some solicitors fear that suggesting mediation to their clients will cause them to lose out financially. However, rather than perceiving mediation as a threat to their business, solicitors should view mediation as a potential source of untapped income. At present, negotiation forms a central part of their work, as they try to settle cases before they reach a full court hearing. Accordingly, many solicitors will already have the necessary skills to train as mediators themselves.

This is borne out by recent research on mediation in divorce cases, which found that while mediators are generally seen as impartial, and solicitors as partisan, the two are in fact closer in practice. Though formally partisan, solicitors adopted an impartial approach in trying to negotiate an agreement.\(^{61}\)

In addition to becoming mediators themselves, solicitors could also play another important role in mediation. As a mediator must be entirely independent, a lawyer-mediator cannot act on behalf of his or her own client at a mediation hearing. However, as mediations become more commonplace, those involved may wish their solicitor to represent them at the hearing. Thus, solicitors will be required as representatives in mediation, rather than in court cases. While their negotiation skills will be helpful in doing so, a different approach will be required to that employed under the adversarial court system.\(^{62}\)

It is clear that in order to stimulate interest and enthusiasm among the legal profession, there is a need to educate its members about mediation. Mediation must be seen as complementary to the court system, rather than as in direct opposition to it. It is accordingly a potential growth area for solicitors, where they can utilise existing skills, while also learning new ones.

5.4 Other advisers

While the legal profession has a very important role to play in increasing awareness of mediation, many of those with civil disputes will never approach a solicitor, often because they cannot afford to do so. Scottish Consumer Council research suggests that only around one-third of those with civil disputes approach a solicitor or law centre for help. A similar proportion will go to a citizens’ advice bureau, consumer advice centre or other advice agency.\(^{63}\)

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\(^{60}\) The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999

\(^{61}\) Meeting in the middle: a study of solicitors’ and mediators’ divorce practice; Fiona Myers and Fran Wasoff, Legal Studies Research Findings No 25, Scottish Executive Central Research Unit, 2000

\(^{62}\) See eg Representing Clients in Mediation- an essential new skill, Marcus Stone, Journal of the Law Society of Scotland Volume 45 No 7, July 2000 at p34 and Volume 45 No 8, August 2000 at p32

\(^{63}\) Civil Disputes in Scotland: A report of consumers’ experiences; Scottish Consumer Council, 1997
It is therefore crucial that advisers in citizens’ advice bureaux and other advice agencies know about mediation, and how to identify suitable cases for onward referral.

Non-solicitor advisers traditionally take a less adversarial approach to clients’ problems. They are therefore likely to be more receptive to the idea of mediation. The importance of raising awareness among advisers has been recognised by the Advice Services Alliance (ASA), which recently published a comprehensive UK guide on ADR for advice agencies.\(^{64}\) ASA has secured further funding for an accompanying training programme for agencies on making appropriate referrals to ADR, including mediation.

Moreover, this training programme will also involve support for advice agencies wishing to offer mediation services. The potential for advice agencies themselves to become providers of mediation services is well demonstrated by the experience of the Edinburgh mediation project.

5.5 The judiciary

Where a dispute reaches the court stage, the judiciary has a crucial role in the promotion of mediation. However, members of the judiciary are lawyers, who have been trained in the adversarial court system. It is therefore likely that their views on mediation will be similar to those of the legal profession.

Research on family mediation has found considerable variation among sheriffs in referral to mediation. This variation in approach seemed to depend on the sheriff’s views on the value of mediation. While some saw mediation as playing a valuable role, others were sceptical about its value.\(^{65}\)

In his Access to Justice report, Lord Woolf considered that the courts should encourage the use of ADR in appropriate cases. It was therefore essential that the judiciary, as well as court staff, were aware of the availability of ADR. All full-time members of the judiciary have been given awareness training on ADR, particularly mediation, to accompany the new court rules.

A similar training programme would be required in Scotland as part of any new strategy to encourage the use of mediation in civil disputes. This is discussed further at 6.9.

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64. Advising on ADR: The Essential Guide to Appropriate Dispute Resolution; Margaret Doyle, Advice Services Alliance, 2000

65. The Role of Mediation in Family Disputes in Scotland, Jane Lewis, Legal Studies Research Findings No 23, Scottish Office Central Research Unit, 1999 at Section 3
6 How can the use of mediation be encouraged in Scotland?

6.1 Overview

Mediation has clear benefits as a means of resolving many civil and consumer disputes, and its advantages are increasingly recognised throughout the world. However, while there has been some recognition of its merits in Scotland, mediation has not yet taken hold in this country to any real extent.

The foregoing chapters have examined the arguments in favour of mediation, and considered some of the reasons why mediation in non-family civil disputes has not developed as quickly in Scotland as elsewhere.

This chapter goes on to consider how the present barriers to mediation in civil and consumer disputes in Scotland might be overcome, and examines how the development of mediation in such cases might be encouraged.

6.2 The need for a civil justice review

First and foremost, a full-scale review of the entire civil justice system, along the lines of the Woolf review in England and Wales, is required. This is necessary to ensure that the system meets so far as possible the needs of those who will use it in the twenty-first century.

Over the past twenty years, many individual aspects of the civil justice system have been reformed. Such reforms include the introduction of the small claims procedure, new protections for debtors, and simplified divorce procedure.

However, while these changes have been welcome, they have been made on a largely piecemeal basis. There is a danger that paying detailed attention to such specific matters obscures the need to review the entire structure of the system, to assess its adequacy for the new and increased demands being placed upon it.

While such a piecemeal approach to reform may improve aspects of the system in the short term, it limits the extent of reform, as the changes made must fit into the existing civil justice structure. One important consideration in reviewing the present system is the need to recognise the potential value of mechanisms for resolving disputes outwith the traditional adversarial court system, including mediation.

6.3 Mediation and community legal services

If mediation is to become more widely recognised as an alternative to the court process, mediation schemes must form an important part of any integrated network of community legal services.

If efficient and effective community legal services are to become a reality, there is a need for central government support for mediation services as part of its overall civil justice policy. Mediation must be officially recognised and promoted as a legitimate and effective means of resolving disputes, while public funding must be made available to set up mediation schemes to meet the demand that this will generate. The question of funding is further explored at 6.10 below.
6.4 A culture of early settlement

Mediation must be promoted in the context of a general culture of resolving disputes at the earliest possible opportunity. Consumers, businesses and public bodies alike, as well as their representatives, must be encouraged to see the benefits of settling their case before they get to the stage of using any formal process, whether this be court or an ADR process.

Taking a dispute to any formal resolution process, including mediation, involves time, money and inconvenience for both parties. It also has resource implications for the civil justice system. It therefore makes sense for all involved to try to resolve their differences by good communication at the earliest stage possible.

Consumers should be encouraged to contact the other party to a dispute at the outset, to try to resolve matters informally. Advisers should encourage consumers firstly to exhaust the informal options available, with the adviser’s help if necessary. This might involve writing to the other party, for example, or using their complaints procedure. In the case of traders, there may be recourse to a trade body.

Businesses should also be encouraged to avoid disputes arising in the first place. Traders who do not currently subscribe to a trade code of practice should be made aware of the benefits of doing so. In line with the UK government’s consumer strategy, the Office of Fair Trading (OFT) is currently reviewing the codes of practice used by trade bodies. It is proposed that in due course the OFT will be given new powers to endorse codes which meet certain minimum criteria.66

This can only benefit traders, who can attract business by advertising their membership of an approved code. This will also help consumers, who will then be able to identify reliable traders, in the knowledge that if something goes wrong, it should be put right at an early stage.

Consideration might also be given to encouraging schemes along the lines of the Lisbon Arbitration Centre for Consumer Conflicts, set up in 1989. The aim of this publicly funded project is to ensure fast, effective and free resolution of small consumer disputes by providing information, mediation, conciliation and arbitration.

The scheme has proved very successful for consumers. In 1999, only 4% of traders contacted by the centre refused to accept voluntary arbitration in an attempt to resolve the dispute. It is likely that this success is due in part to the fact that traders who participate in mediation and arbitration at the centre can publicise the fact that they will comply with the scheme.67


6.5 Changing attitudes

If mediation is really to become established in Scotland, there are a number of cultural barriers to be overcome. There appears to be a general lack of awareness of mediation and its benefits among members of the public and the legal profession. There is also evidence that some members of the legal profession and the judiciary lack enthusiasm about mediation as a means of dispute resolution.

It must be acknowledged that a change in attitudes will not happen overnight, but will be a slow and gradual process. However, the evidence from England and Wales, where similar cultural problems exist, is that recent reforms are slowly influencing change. The key to changing attitudes lies in raising awareness about mediation and the benefits it can offer. There are a number of ways in which this might be achieved in Scotland.

6.6 The public

In England and Wales, Lord Woolf considered that raising public awareness about ADR should be the responsibility of the Lord Chancellor and the Court Service. A public awareness campaign subsequently launched by the Lord Chancellor consists of a package of measures, including a public education campaign in the media.

Other measures include a new edition of a Court Service booklet on resolving disputes without going to court, and the launch of an on-line ADR directory, linked to the Community Legal Service website.

If members of the public know that mediation exists as an option, they are more likely to seek it out actively when they become involved in a dispute. There is, therefore, a need for a large-scale publicity campaign in Scotland on the benefits of mediation, in the context of community legal services. A public education campaign, including the production of an updated version of the Scottish version of the official booklet on resolving disputes without going to court, would be a helpful initial step towards increasing public consciousness about mediation.

6.7 The legal profession

The legal profession has a central role in helping those involved in disputes to make informed choices about how they resolve them. However, the evidence suggests that most solicitors are presently unlikely to suggest mediation to clients in non-family cases. There is accordingly a clear need to promote the benefits of mediation to the legal profession.

68. Resolving Disputes Without Going to Court; Scottish Courts Administration, 1996
69. Note: while advocates undoubtedly have a role to play in mediation, a client’s initial and main point of contact will usually be the solicitor. Accordingly, the present discussion about awareness of mediation among the legal profession concentrates on solicitors.
The Law Society of Scotland is clearly the appropriate body to perform this educational role. The mediation committee set up by the Society has expressed concern over the low take-up rate of non-family mediation, while recognising that mediation has considerable potential for solicitors.\(^70\) However, research has found that those involved in mediation (both lawyers and non-lawyers) felt that the Society was not sufficiently active in promoting ADR.\(^71\)

If the potential benefits which mediation offers to solicitors are to be realised, the Law Society must take steps to promote mediation actively to its members as a source of future business. If this does not happen, the legal profession may lose out on this potential source of revenue, as non-lawyer mediators move in and take the business away from them.

The Society must encourage its members not only to consider becoming mediators themselves, but also to act as representatives in mediation, as they currently do in court cases. It is essential that mediation is presented to solicitors as being complementary to court, rather than as its polar opposite. Rather than viewing acceptance of mediation as a sign of weakness, it should be presented positively as being in the interests of both parties. Solicitors should be encouraged to view mediation as a means of achieving the best outcome for both parties, which preserves relationships while saving time and money.

It would also be open to the Society to take a more formal approach to promoting mediation. This might be done by means of a practice rule requiring solicitors to consider mediation as an option, and to make their clients aware of its existence.

Another important way forward in changing the culture within the legal profession is to ensure that future solicitors are aware of mediation and its benefits before they even enter the profession. There is a growing recognition of the importance of ADR among Scottish universities, and most include some discussion of mediation in their curriculum.

However, the extent and nature of the coverage varies among universities. While most include some discussion of ADR as part of a compulsory course in the law degree curriculum, others include it only on an optional basis. Only Aberdeen University provides an entire (optional) course on ADR as part of the degree.

Most universities cover mediation in some form in the postgraduate Diploma in Legal Practice, which is a prerequisite qualification for training as a solicitor or advocate. Some presently cover only family mediation, while the Glasgow Graduate School of Law provides practical mediation training. Dundee University plans to introduce an optional ADR course onto the Diploma.

In the longer term, it is vital that mediation is presented to law students as a serious alternative to court. Such an approach should gradually help to change the present adversarial culture within the profession to a culture that is more positive and consensual.

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70. Law Society of Scotland Annual Report 1998. Note: the Society no longer has a separate mediation committee

71. Alternative Dispute Resolution in Scotland; Richard Mays and Bryan Clark, Scottish Office Central Research Unit, 1996. Note: similar views were expressed about the Faculty of Advocates
6.8 Other advisers and court staff

Many people with civil disputes will never go to a solicitor for help, but will instead approach an advice agency.\(^{72}\) It is therefore essential that lay advisers know about mediation, and how to identify and refer suitable cases. They must also be aware of mediation schemes in their area, as part of an integrated local network of community legal services.

The work being done by Advice Services Alliance\(^{73}\) will help to raise awareness among advisers. However, there will also be a need for individual advice networks to raise awareness of mediation among their advisers, and to ensure that they receive appropriate training.

It is also vital that staff in the civil courts are aware of the potential uses of mediation, and have knowledge of local mediation provision. This is particularly important for those dealing with small claims cases, as the first port of call for those intending to raise an action is often the sheriff clerk’s office. Lord Woolf recognised the important role of court staff in his Access to Justice report, and recommended that staff were given mediation awareness training. Such training would be an important part of any drive to raise awareness of mediation in Scotland.

6.9 The judiciary

Where a dispute ends up in court, the sheriff or judge has a key role in determining how that dispute is dealt with. If mediation is to become more widely used, it is important that the courts encourage its use as an alternative to a full court hearing in appropriate cases.

One approach might be to follow the example of England and Wales, by introducing court rules requiring sheriffs and judges to encourage parties to consider mediation.\(^{74}\) If such a route were taken, it would be necessary to ensure that parties are not penalised if they choose not to try mediation.

Other alternatives might be to introduce a requirement on sheriffs along the lines of that in ordinary cause and commercial cases, to secure the ‘expeditious progress’ or ‘expeditious resolution’ of a dispute\(^ {75}\) in other types of case. Proposals in 1998 for new small claims and summary cause rules included a provision that ‘the sheriff must seek to resolve the matters in dispute between the parties, when they are before him, without the matter proceeding to a hearing at which evidence is led’\(^{76}\). However, it is not yet clear whether this provision will find its way into the new rules.

Another possibility might be to introduce a rule along the lines of that in family cases which gives the sheriff discretion to refer parties to mediation.\(^ {77}\) While there is at present nothing to prevent sheriffs suggesting mediation to parties, the introduction of such a rule into small claims, summary cause and non-family ordinary cause procedures might help to raise their awareness of its existence.

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72. See 5.4
73. See 5.4
74. The Civil Procedure Rules 1998 are further discussed at 3.3.
75. See 3.3 for further discussion
77. Ordinary Cause Rule 33.22, further discussed at 3.3
It may be, however, that a change in judicial attitudes could equally be achieved without the introduction of new court rules. The experience of the Edinburgh project supports this view to some extent.

The initial research on the project concluded that a change of attitude among sheriffs was necessary, and that there was a need for sheriffs to make direct recommendations of mediation. However, as the project has become more established, the signs are that more sheriffs are becoming aware of mediation, suggesting mediation to parties in small claims cases.

Whatever approach is followed, sheriffs and judges will require training on mediation and its benefits, as well as how to identify suitable cases. Given that members of the judiciary were previously solicitors or advocates, it is to be expected that some will be sceptical about mediation. However, awareness training is likely to go at least some way towards altering their perceptions.

Sheriffs and judges should also be subject to a regime of continuing professional development, as an integral part of their training programme. Under such a regime, they would be required to complete a minimum number of hours of relevant training each year, in order to keep their skills and knowledge up to date. This ongoing training should include training on mediation.

6.10 Funding for mediation services

If consumers and those working within the civil justice system are to be encouraged to consider mediation as a means of resolving disputes, sufficient affordable and accessible mediation services must be made available to meet the demand which this will create. While there are presently a considerable number of private mediators operating in Scotland, there is a distinct lack of public funding for mediation services, outwith the family and community fields.

Private mediators charge considerable fees, which are beyond the reach of most consumers with low-value disputes. The standard CEDR mediation fee, for example, is £825 per party for disputes up to £50,000. If the use of mediation is to be promoted in civil and consumer disputes, mediation services must be supported by public funding.

The Scottish Executive has provided funding for community mediation, while legal aid is available for family mediation. However, aside from the Edinburgh project, which is currently funded by the Scottish Executive, there has been little state support for other types of mediation in Scotland.

79. 7% of all referrals to the mediation project during the period April 1999-March 2000 were made by sheriffs; Edinburgh Sheriff Court Advice Project Mediation End of Year Report April 1999-March 2000 (unpublished)
80. Source: The Centre for Dispute Resolution website (www.cedr.co.uk). Note: this fee includes mediator contact with parties before the mediation, mediator preparation, an eight to ten hour day of mediation and management support for the process.
While legal aid funds are available for mediation in non-family civil disputes in England and Wales, legal aid for mediation has to date been available in Scotland only for family cases. However, the Scottish Legal Aid Board recently declared its intention to make legal aid available for mediation in non-family disputes.

While this is a welcome step forward, it is essential that mediation, however funded, remains a voluntary process. A situation should not be permitted to arise where those on legal aid are forced into mediation as a requirement of their legal aid certificate, leaving redress through the courts available only to those who can afford it.

The introduction of legal aid funding will, in theory, allow more consumers access to mediation. However, the present eligibility limits mean that few people qualify for legal aid, while some may be required to pay a sizeable contribution towards the cost.

Moreover, the current legal aid system remains geared towards the traditional services provided by private practice solicitors. The success of such a measure would therefore depend on whether the solicitor or other adviser brought the option of mediation to their clients attention.

In the future, mediation services must be part of an integrated network of community legal services. Initially, pilot mediation projects could be set up in different geographical areas, based on a variety of models, before rolling out the more successful models throughout Scotland. There is also a need for further in-court advice projects throughout Scotland, which can identify and refer appropriate cases to mediation either before a court action is raised or before a full court hearing.

In the longer term, funding of mediation services dealing with consumer disputes is a difficult and complex issue. The majority of consumer disputes involve small sums of money, while legal aid (beyond limited advice and assistance) is not currently available for small claims cases. In any case, the incomes of many of those involved in such cases are above the legal aid threshold. However, the costs of legal advice and representation are very high in relation to the sums involved.

What this means is that at present most consumers involved in low-value disputes have to represent themselves in court, although a small number may be represented by lay advisers. Only those in Edinburgh are fortunate enough to have the in-court adviser and mediation project at their disposal. Therefore, at first glance it appears that any public money spent on mediation services for such cases would be money which is not currently being spent.

81. In October 1998, the Legal Aid Board (now the Legal Services Commission) announced that it would include mediation in non-family civil disputes as an allowable expense: - Principle of general importance CLA 23 as certified by the Legal Aid Board, known as the Wilkinson case
82. Response to Inquiry of the Scottish Parliament Justice and Home Affairs Committee on Legal Aid and Access to Justice; Scottish Legal Aid Board, December 2000
83. Legal Aid (Scotland) Act 1986 Schedule 2 Part II. Note: the financial limit in small claims cases is currently £750, but the Scottish Executive has announced its intention to increase this to £1500.
It must be borne in mind, however, that the aim of proposals for community legal services is to ensure that better and more effective ways are found of providing access to justice. Moreover, the cost to the public purse of administering and hearing a small claims case must also be considered. This cost can be quite substantial where a case progresses to a full hearing in front of a sheriff, potentially taking up an entire day of his or her time.

There are accordingly strong arguments in favour of public funding for mediation services. How these schemes would be administered and run will require extensive consideration, however.

While the Edinburgh model is a useful one, that project clearly cannot continue on its existing basis forever. At present, it relies on private mediators providing their services free of charge in exchange for the experience, in a market where there is little demand for those services. However, this approach is not sustainable in the long term, and any future schemes would require to address the question of how to fund the running of the scheme, while providing adequate payment to the mediators.

While the particular conditions in Scotland must be taken into account, a useful starting point might be to examine how existing schemes elsewhere operate.

A 1996 survey of ADR schemes in the US Federal District Courts found that courts generally used one of four approaches in setting a fee:

- the market rate
- a rate set by the court
- a pro-bono scheme
- a court set fee after a specified number of pro-bono hours

There are difficulties inherent in following any one of these approaches. While a market rate approach may be workable in commercial disputes, for example, such a scheme would be inappropriate for consumer disputes. The costs of such a scheme would be beyond the reach of most consumers, and would in any case be disproportionate to the value of most disputes.

An entirely pro-bono approach would be equally impractical. While individual schemes such as that in Edinburgh may work on this basis for a period of time, this is not a feasible option on a larger scale. An alternative approach might involve some form of state subsidy, while charging the parties a token fee. For example, parties participating in the London pilot scheme (which deals with disputes involving sums of £3000 or more) are charged £25 each.

The Leeds scheme takes a different approach, operating on the basis of fixed fees set at three levels, depending on the value of the dispute. The lowest fee, for disputes involving less than £15,000, is £125 plus VAT per party. This fee covers a four-hour mediation and two-hours preparation by the mediator. Any work over and above this is charged at an hourly rate.

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84. ADR and Settlement in the Federal District Courts: a sourcebook for judges and lawyers; Elizabeth Plapinger and Donna Stienstra, published by the Federal Judicial Center and the CPR Institute for Dispute Resolution, 1996
In addition to the general approaches set out above, there are many possible permutations which might be considered. It may, for example, be more cost-effective to employ full-time mediators, rather than purchase the services of private mediators. It may be necessary to introduce some form of means testing, and/or to require parties to pay a contribution towards the cost of the mediation.

There are numerous possible routes, which will require to be considered in more detail. One way forward would be to pilot a number of schemes based on different approaches, and to carry out a cost-benefit analysis of each, taking into account factors which are difficult to quantify in financial terms, particularly the benefit to the consumer in obtaining better access to justice.

6.11 Regulation and training of mediators

If the availability and use of mediation are to increase, it will be necessary to address the difficult question of regulation and quality control of those providing mediation services. This will involve addressing issues such as whether a standard minimum qualification and/or standard of training should be required. These issues must be considered in the context of the general debate on quality standards in community legal services.

One way forward might be the formation of a single Scottish regulatory body for those practising as mediators, whether privately or otherwise. It is in the interests of consumers that those providing mediation services should be required to meet a satisfactory minimum standard. Membership of any such regulatory body should include a majority of consumer interests.

6.12 Conclusion

The advantages of mediation as a means of resolving civil disputes in appropriate cases are clear. The resolution of disputes by mediation at an early stage saves considerable time, anxiety and money for the parties, as well as for the courts. Mediation also allows a more flexible approach than court, allowing the parties to agree an outcome acceptable to both, and helping to preserve relationships.

These advantages are increasingly recognised throughout the world. However, mediation has not taken hold in Scotland, outwith the family and community fields. If the increased use of mediation in non-family civil disputes is to be encouraged in Scotland, there are a number of issues which require to be addressed.

Mediation must be recognised as a central aspect of the civil justice system, particularly within the context of a community legal services network. It must be promoted to the public and those within the civil justice system as part of a general culture of early dispute resolution.

Ultimately, a change in the culture is required, from the present adversarial approach towards a more consensual, forward-thinking climate. Such a change will not happen overnight, but can be encouraged by raising awareness of mediation, making it a focus of the civil justice system, and providing adequate funding to make this vision a reality.